No. 76-96

In the Supreme Court of the United States

OCTOBER TERM, 1976

BERNARD ZELDIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

Page

Opinion below 1

Jurisdiction 1

Questions presented 1

Statute involved 2

Statement 2

Argument 6

Conclusion 12

CITATIONS

Cases:

Alderman v. *United States,* 394 U.S. 165 7

Brady v. *United States,* 397 U.S. 742 9

Brown v. *United States,* 411 U.S. 223 8

Fisher v. *United States,* No. 74-18, decided April 21, 1976 8

Hampton v. *United States,* No. 74-5822, decided April 27, 1976 ..... 8, 9

Rewis v. *United States,* 401 U.S. 808 10

Rochin v. *California,* 342 U.S. 165 ..... 7, 8

Schneckloth v. *Bustamonte,* 412 U.S. 218 9

United States v. *Barrow,* 363 F. 2d 62 11

United States v. *Bonanno,* 487 F. 2d 654 10

United States v. *Chambers,* 382 F. 2d 910 11

United States v. *Dowdy,* 479 F. 2d 213, certiorari denied, 414 U.S. 823 9

Cases (Continued):

Page

United States v. *Jones*, 433 F. 2d 1176, certiorari denied, 402 U.S. 950 9

United States v. *Miller*, No. 74-1179, decided April 21, 1976 8

United States v. *Osser*, 483 F. 2d 727, certiorari denied, 414 U.S. 1028 9

United States v. *Russell*, 411 U.S. 423 ..... 7-8, 9

United States v. *Silva*, 449 F. 2d 145, certiorari denied, 405 U.S. 918 9

United States v. *White*, 401 U.S. 745 7

United States v. *Zizzo*, 338 F. 2d 577, certiorari denied, 381 U.S. 915 11

Statutes:

18 U.S.C. 2 2

18 U.S.C. 371 2

18 U.S.C. 1952 ..... 2, 10, 11

18 U.S.C. 2511(2)(c) 7, 9-10

Nev. Rev. Stat. 200.660 (1971) 4, 6

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 1976. A petition for rehearing was denied on June 28, 1976. The petition for a writ of certiorari was filed on July 23, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether recorded conversations of petitioner and various co-conspirators relating to a scheme for bribing local zoning officials were properly admitted into evidence at petitioner's trial.

2. Whether petitioner's interstate travel and use of facilities of interstate commerce in aid of a scheme to bribe local zoning officials constituted a violation of 18 U.S.C. 1952.

STATUTE INVOLVED

18 U.S.C. 1952 provides in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to
>
> * * * * *
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
>
> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2) and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means * * * (2) extortion, bribery, or arson in violation of the laws of the State in which commited or of the United States.

STATEMENT

After a jury trial in the United States District Court for the District of Nevada, petitioner was convicted of interstate travel and use of the facilities of interstate commerce in aid of a scheme to bribe local zoning officials and of conspiring to commit that offense (18 U.S.C. 1952, 2, 371).[1] He was sentenced to concurrent terms of imprisonment for a year and a day on

[1]Two co-defendants, Adrian Wilson and James G. Ryan, were also convicted on these charges.

each count and was fined $10,000 on each count. The court of appeals affirmed in a comprehensive opinion (Pet. App. A).

1. Co-defendant Adrian Wilson, who resided in Los Angeles, California, owned a parcel of land in Clark County, Nevada. Wilson sought a favorable rezoning of this property by the Clark County Board of Commissioners, then consisting of commissioners Broadbent, Leavitt, Brennan, Wiesner and co-defendant Ryan. Petitioner is a local businessman who was to take charge of the property after the rezoning (Pet. App. 4).

Mira Mizera, a Nevada realtor, offered his services to Wilson when he learned of the latter's desire to rezone and develop his Clark County property. In a January 1972 meeting in Los Angeles, Mizera told Wilson that rezoning could be accomplished only if the county commissioners were given "political contributions" (1B Tr. 16-18).[2] He suggested a $10,000 figure and volunteered to contact the commission members (1B Tr. 19). Subsequently, Mizera met with Commissioner Ryan to discuss the rezoning plan. In a second meeting, in February 1972, he told Ryan that the latter would receive a $10,000 contribution for his assistance (1B Tr. 21-27). At another meeting in late March or early April, Ryan told Mizera that he did not want to approach the other commissioners personally on the Wilson matter and that Mizera would have to solicit their support himself (1B Tr. 29-30; 1C Tr. 287).

[2]"1A Tr. " etc. refers to the volume (1A through 1J) and page of the transcript of the testimony of particular witnesses on particular trial days, or of other proceedings. Volume 1G consisted of volumes IV through VIII of trial testimony and is cited, *e.g.*, "1G IV Tr."

Wilson had introduced Mizera to petitioner in Las Vegas and had described petitioner as the developer for his tract. At a later meeting, Mizera advised petitioner that he had unsuccessfully attempted to contact the campaign manager for Commissioner Leavitt. Petitioner then said that he would handle the matter himself (1B Tr. 99). Mizera met with Commissioner Leavitt and told him that Wilson would contribute $3,000 if the rezoning were approved. Leavitt responded only that he was not interested in a campaign contribution and that he would consider the application on its merits (1G IV Tr. 569-595). Leavitt subsequently received a call from his campaign manager, who asked him about the Wilson application and told him that it was petitioner's "deal" (1G IV Tr. 577, 588, 595).

2. On April 20, 1972, Mizera contacted Commissioner Broadbent. Mizera offered him a $2,000 contribution, and Broadbent feigned interest. When Mizera left, Broadbent immediately called the State Attorney General's Office. Broadbent met with state investigators and agreed to have his subsequent telephone or face-to-face conversations with Mizera recorded (1 E Tr. 393, 405, 507).[3] Mizera and Broadbent met again on May 2, 1972. At this meeting Mizera told Broadbent of Commissioner Ryan's involvement in the plan and of petitioner's intent to solicit the aid of Commissioner Leavitt's campaign manager (1E Tr. 407-413).[4] At this point in the investigation, the state

[3]Out of an abundance of caution, the state authorities also secured a court order pursuant to a Nevada law, Nev. Rev. Stats. 200.660 (1971), authorizing the interception of Broadbent's telephone calls.

[4]Mizera also contacted Commissioners Brennan and Wiesner and offered them funds in exchange for a favorable zoning vote. Both rejected his offer and insisted that they would examine Wilson's rezoning application on its merits. Brennan eventually voted against the plan, while Wiesner supported it (1B Tr. 42-44; 1G IV Tr. 630-641; 1G IV Tr. 612).

agents commenced wire interception of Mizera's office and home telephones, pursuant to a state court order under Nevada law. The wire interception was to last from May 5 until May 19, 1972.

Meanwhile, on May 9, 1972, co-defendant Wilson applied in Los Angeles for a $12,000 loan.[5] On May 10, Mizera again called Broadbent to confirm his support for the rezoning and told him, somewhat inaccurately, that the $10,000 had actually been obtained and that petitioner had it. On May 16, at the request of the state investigators, Broadbent told Mizera that he could no longer support the rezoning plan (1E Tr. 424, 425). Disturbed, Mizera called petitioner, who was then in Los Angeles, and asked if "his man" Leavitt would make the motion to approve rezoning. Petitioner later called back and said that while Leavitt would support the proposal, he would not introduce it (1B Tr. 101-103). Mizera then contacted Ryan and persuaded him to make the motion, in return for $5,000 (1B Tr. 61; 1C Tr. 302-304, 356). The realtor then called petitioner in Los Angeles again, told him that all was well, and asked him to assure that Wilson would have the money in Las Vegas after the Board of Commissioners met (1B Tr. 104, 105). The same day, petitioner went to Wilson's office in Los Angeles and received some $11,000 in cash from him in $100 bills. This was to be delivered to Mizera only if the zoning proposal passed (1G VIII Tr. 1456-1490).

[5]On April 26 or 27, Wilson secured the services of a Nevada attorney, William Morris, to help pursue the rezoning application. Mizera told Broadbent about Morris, who in fact was a close friend of the commissioner. Not wanting his friend to become involved in the bribery investigation, Broadbent sent word to Morris that he should withdraw, and the attorney thereupon terminated his representation of Wilson. Broadbent's activity in this regard was done in his personal capacity, without informing the state authorities (1E Tr. 432-468; 1G VIII Tr. 1551-1578).

3. At this point, through Broadbent's cooperation the state investigators were aware of the general nature of the scheme. They concluded, however, that Mizera's assistance was necessary to discover all participants in the affair. On May 19, 1972, state agents disclosed to Mizera their investigation of the developing bribe scheme. They first read to him the relevant Nevada bribery statute and described some of the evidence they had gathered against him. They offered him immunity from prosecution if he cooperated. This would permit him to retain his real estate license. The agents also toid him that if he did not help secure sufficient evidence, he would be indicted; that he would go to jail for the maximum of 10 years; that he should not get an attorney or his usefulness would be over; that his health would suffer in jail and that his friends, petitioner and Wilson, would be "kept out of it" (Pet. App. 9-10). Mizera agreed to cooperate, and thereafter his telephone and personal conversations were recorded with his consent.

Mizera met Wilson in Las Vegas on May 21, 1972, and described how the $11,000 was to be distributed (1B Tr. 79-94). The Board of Commissioners met on May 22, 1972, and Ryan moved to rezone the Wilson property. The motion passed, with Ryan, Wiesner, and Leavitt voting in favor of it. Mizera then met with petitioner and Wilson. Petitioner gave the realtor an envelope containing $8,000 in cash. Bank wrappers on the bills showed that the currency came from the Security Pacific Bank in Los Angeles, where Wilson had borrowed the funds (1D Tr. 12). The next day, Mizera met with Ryan, gave him the $5,000 promised, and then signaled nearby agents, who moved in and arrested the commissioner.

ARGUMENT

1. Petitioner contends (Pet. 19-26) that the Nevada wire interception statute (Nev. Rev. Stat. 200.660 (1971)

(Pet. App. C)) is unconstitutional and that the interception orders issued pursuant thereto in the course of this investigation were unlawful. This issue was not resolved by the courts below and is not appropriate for resolution by this Court in the present context, since neither the conversations monitored under the Mizera interception orders nor fruits thereof were introduced into evidence at petitioner's trial.

After trial, the district court conducted a taint hearing, as a result of which it concluded that no significant information had been derived from the overhearings here challenged, and that in any event the information that Broadbent had obtained from his dealings with Mizera and voluntarily passed on to investigators constituted an independent source for any "leads" arguably contained within the taped conversations.[6] This purely factual conclusion was upheld by the court of appeals (Pet. App. 8) and does not warrant review by this Court.

2.a. Petitioner does not challenge the established rule that oral communications may properly be intercepted if one party to the conversation consents. *United States* v. *White*, 401 U.S. 745; 18 U.S.C. 2511(2)(c). However, relying on *Rochin* v. *California*, 342 U.S. 165, and *United*

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[6]Many of the challenged conversations were between Mizera and persons other than petitioner. Petitioner has standing to challenge the admissibility only of conversations in which he himself participated or the fruits of his overheard conversations. *Alderman* v. *United States*, 394 U.S. 165. While petitioner's co-defendants availed themselves of the opportunity to present evidence at the taint hearing, petitioner made no showing that evidence useful against him was derived from overhearings of his conversations with Mizera, intercepted pursuant to state court order. As the district court observed, "[petitioner] doesn't really comply at all with the Court's order [convening the taint hearing], filed no brief * * * [and] has wholly failed to show with any specificity what evidence was shown at the trial and what lead the state investigator or federal prosecutor came upon as a result of those conversations that were monitored" (1J Tr. 168-169).

States v. *Russell*, 411 U.S. 423, petitioner challenges the means by which the state agents secured Mizera's cooperation and consent to record his conversations after May 19. He contends that those means were "so outrageous" as to violate due process (Pet. 7-15).

Since the actions of the state agents were directed towards Mizera and not petitioner, the latter has no standing to challenge their activities. As was observed only last Term in *Hampton* v. *United States*, No. 74-5822, decided April 27, 1976, the Due Process Clause may be invoked "* * * only when the government activity in question violates some protected right of the *defendant*" (slip op. 6; emphasis in original). Cf. *Fisher* v. *United States*, No. 74-18, decided April 21, 1976; *United States* v. *Miller*, No. 74-1179, decided April 21, 1976; *Brown* v. *United States*, 411 U.S. 223. In any event, assuming *arguendo* petitioner's standing, his claim is without substantial basis.

While the court of appeals did not "condone the tactics used to gain Mizera's co-operation" (Pet. App. 10), it correctly held that the state agents' conduct was not "so outrageous" as to violate due process. *Russell*, *supra*, 411 U.S. at 431. This is not a case in which the innocent associate of a suspect is browbeaten with threats of criminal punishment having no basis in fact, in order to secure his cooperation. The evidence with which the agents confronted Mizera was accurate. Even more important, there was no causal connection between the agents' misconduct and Mizera's decision to cooperate. Mizera's predicament arose not from the agents' statements but simply from his awareness that the state authorities knew of his involvement in the bribery scheme. As the court below noted, "nothing said or done thereafter was likely to change his decision" (Pet. App. 11). The mere fact that an individual's cooperation is generated by a desire for leniency does not, of course, render that cooperation involuntary, let alone approximate the gross physical invasion of *Rochin*. Just as a guilty

plea is not void when made to secure a lesser sentence,[7] so too a consent to interception of oral communications is valid when motivated by similar considerations.[8]

Indeed, the reasoning in *Hampton* v. *United States*, *supra*, is applicable here. There the plurality concluded that the Due Process Clause would apply to untoward police conduct only if the challenged activity had violated a specific "protected right of the defendant" (slip op. 6). In this case petitioner invokes only a claim to the continued cooperation of a confederate in concealing a crime. The very statement of this "right" reveals its specious nature; indeed, "the police conduct here no more deprived defendant of any right secured to him by the United States Constitution than did the police conduct in *Russell* deprive Russell of any rights." *Hampton*, *supra*, slip op. 7.[9]

b. In the alternative, petitioner argues (Pet. 18-19) that under *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 248-249, the agents' conduct rendered Mizera's consent involuntary. While *Schneckloth* involved a quite different question of the standards for assessing the validity of a consent given by the defendant himself, we recognize that petitioner may be entitled by virtue of 18

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[7] See, *e.g.*, *Brady* v. *United States*, 397 U.S. 742, 751.

[8] See, *e.g.*, *United States* v. *Osser*, 483 F. 2d 727, 730 (C.A. 3), certiorari denied, 414 U.S. 1028; *United States* v. *Dowdy*, 479 F. 2d 213 (C.A. 4), certiorari denied, 414 U.S. 823; *United States* v. *Silva*, 449 F. 2d 145 (C.A. 1), certiorari denied, 405 U.S. 918; *United States* v. *Jones*, 433 F. 2d 1176 (C.A. D.C.), certiorari denied, 402 U.S. 950.

[9] Petitioner also contends that the agents' discussion with Mizera deprived petitioner of a "fair trial" (Pet. 14). Since the challenged conduct occurred only during the investigatory phase of the case, petitioner's subsequent trial was not affected.

U.S.C. 2511(2)(c) to challenge the voluntariness of Mizera's consent. Here again, however, petitioner's claim is confounded by the finding of the lower courts that Mizera's consent was a voluntary decision resulting from the predicament with which he was legitimately confronted by the agents' disclosure of the evidence they had accumulated against him.[10]

3. Relying on *Rewis* v. *United States*, 401 U.S. 808, petitioner contends that federal jurisdiction under 18 U.S.C. 1952 was improperly invoked in this case. *Rewis* reversed a conviction under Section 1952 because the only demonstrated use of interstate facilities consisted of travel by gambling house patrons across state lines in order to frequent the establishment. *Rewis* nonetheless approved (401 U.S. at 813) the holdings of three courts of appeals that Section 1952 was correctly applied to

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[10]In *United States* v. *Bonanno*, 487 F. 2d 654, 658 (C.A. 2), the court noted:

> In cases involving physical search, the person alleged to have consented is doing something apparently contrary to his own interests or to those of another who often is in some way connected with him. An informer's consent to the monitoring or recording of a telephone conversation is an incident to a course of cooperation with law enforcement officials on which he has ordinarily decided some time previously and entails no unpleasant consequences to him. Hence, it will normally suffice for the Government to show that the informer went ahead with a call after knowing what the law enforcement officers were about.

The agents' discussion with Mizera on May 19 was itself recorded and was considered by the district court in resolving petitioner's challenge to Mizera's consent.

cases in which the use of interstate commerce to promote illegal local offenses was far less extensive than in the present case.[11]

Petitioner's contention is frivolous. Section 1952 is in fact precisely directed against schemes such as that in which petitioner was involved. Petitioner's co-defendant and co-conspirator Wilson lived in the adjoining State of California, and in conjunction with him, Mizera and petitioner made extensive use of interstate facilities to pursue the Nevada bribery plan. Wilson, Mizera, and petitioner traveled between the States several times in formulating their illicit design, and all three conversed frequently through interstate phone calls. Indeed, petitioner himself carried the bribe money from California to Nevada, where it was ultimately given to Commissioner Ryan.[12]

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[11]*United States* v. *Chambers*, 382 F. 2d 910 (C.A. 6) (manager of brothel solicited taxi drivers to bring clients across state lines); *United States* v. *Zizzo*, 338 F. 2d 577 (C.A. 7), certiorari denied, 381 U.S. 915 (employees of local gambler resided across state line); *United States* v. *Barrow*, 363 F. 2d 62 (C.A. 3) (same).

[12]Broadbent's warning to attorney Morris (see p. 5, n. 5, *supra)* and the latter's subsequent withdrawal are characterized by petitioner as a governmental attempt "to sever the attorney-client relationship of petitioner" and to deny him counsel during the investigatory phase of the case (Pet. 16). There is no merit to this contention, however, for Morris was retained by Wilson, not petitioner; the attorney in fact testified that he had never met petitioner until just before trial (1G VI Tr. 1254-1255). Even if Morris had also represented petitioner, however, no error would have resulted, because Broadbent's actions in contacting Morris could not properly be imputed to the government. While Broadbent was generally cooperating with the investigators, he did not consult them before warning Morris, but acted solely in a private capacity in order to protect an old friend (Pet. App. 12).

Broadbent's actions could not, in any event, have affected petitioner's right to defend himself in a criminal action, because

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Morris was retained solely to assist in securing the rezoning of Wilson's property. He was not retained with regard to criminal proceedings which might arise from the bribery scheme, because the co-conspirators obviously did not foresee the discovery of their scheme.